

1 IN THE UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF ALABAMA

3 SOUTHERN DIVISION

4

5 IN RE BLUE CROSS BLUE SHIELD CASE NO. 2:13-cv-20000-RDP  
ANTITRUST LITIGATION MDL 2406

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STATUS CONFERENCE

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11 BEFORE THE HONORABLE R. DAVID PROCTOR, UNITED STATES  
12 DISTRICT JUDGE, at Birmingham, Alabama, on Monday, May 16,  
13 2022, commencing at 9:42 a.m.

14

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9 The proceedings were reported by a stenographic court  
10 reporter. The transcript was produced using computer-aided  
11 transcription.

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1                             (The following proceedings were heard before the  
2 Honorable R. David Proctor, United States District Judge, at  
3 Birmingham, Alabama, on Monday, May 16, 2022, commencing at  
4 9:42 a.m.)

5                             THE COURT: All right. Good morning.

6                             COUNSEL IN UNISON: Good morning.

7                             THE COURT: How are y'all doing?

8                             MR. RAGDSDALE: Good.

9                             MR. BOIES: Very well.

10                            THE COURT: Nothing like starting off a Monday morning  
11 in the courtroom on Blue Cross Blue Shield. And that's what  
12 we're here in, in the In Re Blue Cross Blue Shield Antitrust  
13 Litigation, 13-CV-20000. The Court set this date for a status  
14 conference. The Special Master circulated an agenda through a  
15 report to the Court and parties.

16                            Any amendments to the agenda from anyone?

17                            (No audible response.)

18                            THE COURT: All right. First we'll take up the status  
19 of the subscriber track cases. Who wants to lead that off?

20                            MR. BOIES: I will, Your Honor.

21                            THE COURT: Okay. Good morning, Mr. Boies.

22                            MR. BOIES: Good morning, sir. It's a pleasure to be  
23 back in person.

24                            THE COURT: Yes. This is the first time in Birmingham  
25 since COVID; right? Or second?

1 MR. BOIES: The second time.

2 THE COURT: Second time. Sorry.

3 MR. BOIES: Second time. Second time.

4 THE COURT: I had to do my math real quick. I've been  
5 traveling a lot, so I'm losing track of your travel.

6 MR. BOIES: I think we are -- as Winston Churchill  
7 once said, I think we're past the beginning of the end, and I  
8 think we're getting close to the end. I think the real  
9 question is whether the Court thinks it needs any additional  
10 briefing or whether any of the objectors or the parties  
11 believe that the Court needs additional briefing before you  
12 proceed to make your decision.

13 THE COURT: All right.

14 MR. BOIES: We've obviously explored the issues in a  
15 lot of depth both in briefing and in hearings. I think if  
16 there is additional briefing, we could do it very quickly. I  
17 think that with respect to the appellate schedule, if anybody  
18 does appeal, I think we would like to get this resolved in  
19 time so that it can get moving and it doesn't sort of bleed  
20 over into subsequent years.

21 THE COURT: Right.

22 MR. BOIES: So if there were going to be additional  
23 briefings, I think we would urge that it be done in a week or  
24 so. I think everybody knows --

25 THE COURT: And I take it your position would be that

1 if there is additional briefing, all that is necessary to be  
2 briefed are the issues raised by the Court previously and the  
3 re-notice, those cabinet of those issues.

4 MR. BOIES: I think it's cabined by that. I think  
5 it's also cabined by those remaining objectors. As the Court  
6 may be aware, a number of the potential objectors or people  
7 who indicated they might have objections have now opted out.  
8 So I think we have a limited number of remaining objectors.  
9 So I think it's cabined both as the Court indicated but also  
10 just by, as a practical matter, what potential objectors we  
11 have remaining. And the Court may want to just inquire of  
12 those objectors whether they think they need to have anything  
13 more to say than they've said already. But from our  
14 perspective, I think we're ready to go, and if -- and  
15 obviously we leave to the Court whether the Court thinks  
16 additional briefing would be useful. But if the Court thinks  
17 additional briefing is useful, we'd like to do it as, really,  
18 expeditiously as possible.

19 THE COURT: All right.

20 MR. BOIES: Thank you.

21 THE COURT: I take it the Blues would agree to that?

22 MR. ZOTT: Yes, Your Honor. David Zott on behalf of  
23 the defendants. We do agree with that in the sense that we've  
24 actually taken back a look at all the briefing here over the  
25 last couple days, Judge, and it seems that every issue's been

1 fully briefed, in our view, and --

2 THE COURT: What about on the re-notice? Anything  
3 that needs to be said to the Court about that and, for  
4 example, on an aggressive briefing schedule or not?

5 MR. ZOTT: On what issue, Your Honor?

6 THE COURT: The re-notice issue. The Court directed  
7 the parties to re-notice certain --

8 MR. ZOTT: Our -- yeah. Our view is no in the sense  
9 that we did actually brief it before the Court issued its  
10 order.

11 THE COURT: Right.

12 MR. ZOTT: We had full briefing there. Everyone had  
13 an opportunity. The Court issued the order, and you said  
14 that the only objections would be to the form of the notice.  
15 There was no objection to the form of the notice, so at this  
16 point --

17 THE COURT: That's what I'm getting at.

18 MR. ZOTT: Yeah.

19 THE COURT: As I understand it, there are no -- and  
20 this is a question for everybody here. Any objections to the  
21 form of the notice?

22 MS. JONES: Your Honor, Megan Jones, for the  
23 plaintiffs. There were no objections received. We did open  
24 that up in the supplemental notice and no one objected.

25 MR. ZOTT: Right.

1                   THE COURT: Okay.

2                   MR. ZOTT: So that's our view, Your Honor. And,  
3 obviously, if there's some issue that Your Honor feels like he  
4 would like to hear from us on, that's a different case. But  
5 otherwise, we'd agree, either no briefing or let's move fast.  
6 So, thank you.

7                   THE COURT: And when we say "form of the notice," I  
8 guess I'll just broaden it for safety's sake to say the -- any  
9 deleterious effect of the re-notice. No concerns, arguments,  
10 objections about that?

11                  MS. JONES: Correct, Your Honor, we received no  
12 objections to the form.

13                  THE COURT: Okay. All right. And we have objectors  
14 here. You don't have to speak. I just want to make sure that  
15 you have an opportunity to speak.

16                  All right. I don't know if we need additional  
17 briefing. I take it everybody agrees that what we have in  
18 place before the notice went out is sufficient for the Court  
19 to be informed about the issues it would have to resolve as  
20 part of any order and memorandum opinion on fairness of the  
21 settlement; fair?

22                  MR. BOIES: We think so, Your Honor.

23                  MR. ZOTT: We do as well, Your Honor.

24                  THE COURT: All right. I'm choosing not to caucus  
25 with subscribers and Blues on the subscriber issues because

1 there are objections and because of the stage we are in terms  
2 of the posture of the case. And the parties have been --  
3 parties on all three sides of the case, if you will, have been  
4 very -- have really worked with the Court in terms of using  
5 caucuses in the right way, in my humble opinion. I think  
6 those have moved the ball, but I hope you all understand and I  
7 think you agree that we can still caucus on the provider side  
8 of the case but probably ought not to do that anymore on the  
9 subscriber once there was a request to approve the settlement  
10 put before the Court. So we've kind of, for the most part,  
11 stopped that. That makes me raise this question here in the  
12 public hearing, and that is where we stand on the common  
13 benefit allocation report, really more of a plaintiffs' side  
14 issue. I don't think the defendants are going to weigh in on  
15 this one unless there's something you like or really don't  
16 like. Just kidding.

17 All right. Anything further I need to take up on  
18 that?

19 MR. BOIES: I don't think so, Your Honor.

20 THE COURT: That's what I was thinking, too, but you  
21 understand why I asked.

22 MR. BOIES: Absolutely.

23 THE COURT: All right. All right. Anything else,  
24 including, for the good and the welfare, on the status of the  
25 subscriber track cases?

1 MS. JONES: Your Honor, Megan Jones, for the  
2 subscriber plans. We do have a pending motion for your  
3 approval at Docket Number 2919.

4 THE COURT: It just was filed. I'll grant that. I'm  
5 going to grant that. We'll put an order out on amending --  
6 just to make sure that proviso is in there for the start date  
7 for some of those matters.

8 MS. JONES: Correct. It's a timing issue, Your Honor,  
9 and it's a minor change.

10 THE COURT: Yes. Any objection, before I grant that,  
11 from anyone?

12 MR. LAYTIN: No, Your Honor.

13 THE COURT: All right. I think that was more  
14 ministerial than anything else, but I'll -- we'll be getting  
15 an order out on that, if not today, tomorrow.

16 MS. JONES: Thank you.

17 THE COURT: Yes.

18 Okay. On to the provider side. Let me hear from the  
19 parties first on the providers' side, and then I have a few --  
20 maybe a few questions.

21 MR. WHATLEY: Judge, it's Joe Whatley, for the  
22 providers. It is our first time in Birmingham since COVID  
23 started and it's good to be here in person. We spent the  
24 weekend with my mother in south Alabama before coming here,  
25 and she said to tell you thank you for setting this hearing to

1 bring us down here. We did get down to see her some during  
2 COVID, but she said to tell you thank you for setting the  
3 hearings. I think she'll --

4 THE COURT: She's one of the few moms who likes it  
5 when I set these hearings. Most moms don't want their  
6 "whoever" traveling on to Birmingham. But anyway.

7 MR. WHATLEY: Well, she's now up in Montgomery, so  
8 she's happy for you to set a hearing here in Birmingham and  
9 get us to Montgomery first.

10 THE COURT: Very good.

11 MR. WHATLEY: And, Judge, I think you're aware of  
12 everything going on in our case, and I suppose the best thing  
13 is whatever questions you have we'll respond to. And if there  
14 are difficult questions, either Edith or Barry will respond to  
15 them.

16 THE COURT: All right. Very well. How about from the  
17 Blues?

18 MS. DEMASI: Nothing in addition. The motions are  
19 under consideration, and I'm happy to answer any questions,  
20 Your Honor.

21 THE COURT: All right. So I do have a few questions.  
22 Both -- so I asked the parties -- so we are very much going to  
23 continue on the two tracks running parallel with each other.  
24 I shouldn't say two tracks -- the two approaches -- the  
25 litigation approach and the mediation approach. And I notice

1 we have our highly honored mediator on my screen right now,  
2 who is sitting at his childhood camp that he used to attend.  
3 Seems like every time I talk to him, he's at that camp.

4 Good morning, Bob.

5 MR. WHATLEY: I think he's muted.

6 THE COURT: Yes, that's all right. He's going to stay  
7 muted. He knows when to stay muted.

8 MR. MEYER: I could offer to change the background to  
9 the north shore of Maui.

10 THE COURT: There we go. Thank you. I want you to  
11 eventually change the background to the finish line, but  
12 that's a different story.

13 All right. So we're going to continue marching along.  
14 My job is, obviously, the litigation side. I'll leave the  
15 mediation side to Bob, assisted by Kip, but my question is  
16 this: Both sides have -- I asked both sides, Hey, why don't  
17 you pick out -- because both sides were giving me some  
18 feedback about all these wonderful rulings I made in this  
19 case -- is there anything you'd want me to revisit or  
20 readdress? And both sides landed, as I understand it, on  
21 class certification, including Daubert issues and standard of  
22 review. I'm happy to do that. Do we need any additional --  
23 because we terminated those motions, as you recall, and -- but  
24 they've all been briefed. We're starting to tackle those  
25 things. I just want to make sure everybody has an opportunity

1 to be heard. I take it both sides are comfortable with me  
2 proceeding based upon the briefing we had on the terminated  
3 motions and we don't need anything else from either side on  
4 this?

5 MR. WHATLEY: Yes, sir. I think you're now talking  
6 about class certification and related motions, and the answer  
7 from the providers is yes.

8 THE COURT: Okay.

9 MS. DEMASI: And, Your Honor, from the Blues, we  
10 agree.

11 THE COURT: All right. So, you know, in New York, at  
12 our -- one of our last conferences a few months ago -- Let me  
13 back up. Here's how I'm kind of seeing things right now. We  
14 have a number of balls in the air on the providers' side, and  
15 we've prioritized on the subscriber and the provider side  
16 earlier on in the Alabama cases. But we also did global  
17 discovery on all the cases before we focused on the Alabama  
18 cases and perhaps to some degree did both at the same time,  
19 focused on Alabama cases but let the parties -- allowed the  
20 parties to proceed on discovery and some motion practice on  
21 the entire national discovery issue regarding the MDL issues  
22 presented to the Court in 2013.

23 I guess my question is this: At some point we're  
24 going to have to move to what it seems to me I'd be handling  
25 is an Alabama -- some Alabama rulings and perhaps a national

1 injunction issue that I think the providers want me to take  
2 up. There's a lot of other damage issues, though, and perhaps  
3 specific injunction issues, though, that relate to the other  
4 cases that are associated in this case that have come in and  
5 been transferred. At some point, if I'm working on nationwide  
6 injunction and Alabama damages, for example, and maybe some  
7 specific injunctive -- and I'm keeping all options open here  
8 when I say this -- some specific Alabama injunction issues  
9 that the providers might want the Court to entertain, all  
10 these other cases are just sitting there in orbit waiting;  
11 right? And we're essentially, to some degree, treating the  
12 Alabama cases as the bellwether on damages and taking up the  
13 nationwide injunction claims that the plaintiffs want us to  
14 take up. Why would we keep those cases in orbit if it's  
15 likely I'm never going to be making rulings on those? They're  
16 going to have to be addressed, and I -- you know, if we were  
17 to get to a certain point where we know it's time to decouple  
18 this litigation -- because I don't think it makes sense for me  
19 to be dealing with specific damage issues on these other cases  
20 and specific equitable or injunctive relief issues on these  
21 other cases. That needs to go back to the transferor judges  
22 after we've allowed you to do the global discovery and global  
23 motion practice you wanted to handle. Why wouldn't we get to  
24 that point sooner rather than later to decouple the MDL, send  
25 those cases back, or at least suggest the panel send those

1 cases back, and I'll handle what I'm going to handle anyway?  
2 And we could -- the different judges handling those things can  
3 choose to treat us as a bellwether or not.

4 MR. WHATLEY: Judge, from the provider standpoint,  
5 what we would suggest is this: When you reach the point where  
6 you think remand may be appropriate, we would suggest that the  
7 parties meet and confer and see what we can agree on in terms  
8 of the submission to you. Beyond that, both sides submit to  
9 you the way we think you should handle remand and --

10 THE COURT: Or suggest remand. I don't get to handle  
11 it.

12 MR. WHATLEY: True, true.

13 THE COURT: But I understand what you're saying.

14 MR. WHATLEY: But -- and then to the extent we  
15 disagree, both sides would submit proposals to you --

16 THE COURT: Well, I guess my question is, why wouldn't  
17 I start you on that process now?

18 MR. WHATLEY: Well, I think you can. I think what you  
19 ought to do as a first step is have the parties confer on it,  
20 have the parties make submissions to you on how to handle it,  
21 and maybe at the next time you bring us down to visit my  
22 mother, you -- we have a discussion directly with Your Honor.

23 MS. DEMASI: Your Honor, we would be happy to meet and  
24 confer with the providers about this. I think that our  
25 perspective is that, as the MDL court, there were still some

1 matters that remain for pretrial coordinated proceedings, and  
2 we would be happy to work with the providers to identify those  
3 where there's agreement and then try to find any areas of  
4 disagreement.

5 THE COURT: That's probably the thing I would like you  
6 to do is, all right, let's see if you can agree and then we'll  
7 see if I can agree.

8 MR. WHATLEY: True.

9 THE COURT: But we'll start with whether you agree on  
10 what remaining coordinated pretrial matters ought to be taken  
11 up by the Court under 1407. And if you have a -- if you can  
12 agree on that, then you at least increase the odds that I  
13 might agree with each of you. But what -- I guess that's my  
14 question is, is there any problem with starting that process  
15 now?

16 MR. WHATLEY: No, we'll be glad to meet and confer and  
17 have those discussions and report back.

18 THE COURT: Okay. All right. Okay. I think that's  
19 a -- that would be a healthy thing, from my perspective, for  
20 us to be handling. So that means we can be really working on  
21 three fronts. First front is I'm dealing with the issues that  
22 I will end up handling long-term no matter what happens with  
23 respect to panel remand. Second, you are beginning the  
24 process of asking, What does a suggestion to remand look like?  
25 And, of course, the parties are -- I can make a suggestion to

1 remand, and the parties are perfectly capable and able to give  
2 the panel your own input if you disagree with my suggestion.  
3 And then the third thing is our mediation -- our mediator can  
4 continue working with you on those other matters. So it  
5 really becomes kind of a three-front offensive.

6 (Telephone rings.)

7 MR. RAGSDALE: We can wait for them to answer that.  
8 But how soon would you like us to report back to you on that?

9 THE COURT: You know I'm going to ask you what your  
10 feelings are on that.

11 MR. RAGSDALE: I just I thought I'd -- it sounded like  
12 I was interested in that.

13 MR. WHATLEY: Did you notice Barry's new haircut,  
14 Judge?

15 MR. RAGSDALE: Oh, man.

16 THE COURT: I knew there was something different about  
17 him.

18 MR. RAGSDALE: Thank you, Joe.

19 MR. WHATLEY: No problem.

20 THE COURT: All right. You're forgetting I was an  
21 associate with Barry at Sirote when Barry himself would talk  
22 about Barry hair. Do you remember those days?

23 MR. RAGSDALE: I do indeed.

24 THE COURT: All right. What timing -- do you think a  
25 report in 30 days would be overly aggressive? You realize

1 this is soft. If you're making substantial progress and you  
2 need a little bit more time beyond the 30 days, you call Ed  
3 and you get it.

4 MR. WHATLEY: I was thinking that maybe a report, say,  
5 a week after June 21st --

6 THE COURT: June 21st.

7 MR. WHATLEY: -- just to pick a date out of the air.

8 THE COURT: Well, there's a federal holiday right  
9 before that.

10 MR. WHATLEY: Just 30 days is fine.

11 MR. RAGSDALE: Thirty days.

12 MR. WHATLEY: I'm overruled on that.

13 THE COURT: Well, my point is, if you have 30 days,  
14 that gets you to June 16, and there's a federal holiday right  
15 there. So actually, the 21st probably makes sense. I don't  
16 know if you were picking a date out of the air or actually  
17 contemplating the fact you'd run right up on a federal holiday  
18 before you'd have to make this report.

19 MR. RAGSDALE: Thirty days would be fine.

20 MS. DEMASI: I think 30 days sounds fine.

21 THE COURT: Thirty days. So that means I'll see it in  
22 42. All right. Very well.

23 All right. What else from the providers' side?

24 MR. WHATLEY: I think we can take anything else up in  
25 caucuses, unless you have questions you want us to --

1           THE COURT: You're still allowed to caucus, yes,  
2 that's fine.

3           MR. WHATLEY: Yes, sir.

4           THE COURT: Okay. All right. Very well. Any other  
5 issues the Court ought to take up?

6           (No audible response.)

7           THE COURT: Okay. Well, I continue to appreciate all  
8 the great lawyering we get in this case. We'll take up the  
9 remaining issues the parties want to discuss with the Court in  
10 caucuses, and I think Ed will just coordinate those. We'll  
11 move to the judicial conference room for those. I don't think  
12 we're -- you know, in the past we had a caucus here in the  
13 courtroom with just the Blues and the subscribers together. I  
14 don't think that's necessary this time. I think we've taken  
15 up our business right here in front of everybody; right?  
16 Okay. Well, then, we'll move down to the judicial conference  
17 room. Ties are optional; okay? See you then.

18           (Adjourned accordingly at 10:04 a.m.)

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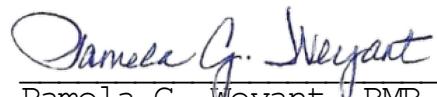
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1 C E R T I F I C A T E  
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I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

4 Dated: May 23, 2022.  
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8 Pamela G. Weyant, RMR, CRR, CCR  
9 OFFICIAL COURT REPORTER  
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